

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2006-050108

11/13/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA STATE DEPARTMENT OF
REVENUE

DAVID J DIR

v.

WISEGUYS INC, et al.

JOHN T GILBERT

MINUTE ENTRY

The Court has considered Plaintiff's Motion for Summary Judgment.

A.R.S. § 42-5028 provides that a person who fails to remit transaction privilege tax is liable for the amount of the tax. The statutory language is somewhat different from that found in A.R.S. § 43-435, the Court believes that the person or persons subject to liability for transaction privilege tax must be the same as those liable for withholding taxes, namely, that the person charged must have been required to collect, truthfully account for and pay over the tax. This is a less specific standard than that codified in federal law, but even the federal statute limits the class of persons liable to those officers, employees, or members who are under a duty to collect and pay the tax. It is not sufficient, then, merely to establish that a person is a corporate shareholder or officer; it must be established, by at least *prima facie* evidence of the person's corporate position or actual responsibilities that the person owed a duty to make sure the tax was properly collected and paid.

Here, Plaintiff asserts that Defendant Carpenter was Secretary and Treasurer, as well as Statutory Agent and a director and shareholder, of Wiseguys, Inc. In his Answer, Defendant asserts that, while he was a principal in Wiseguys, he was a mere silent investor who did not participate in management. Plaintiff has presented a copy of Wiseguys' Corporation Commission filing for 2000, in which Mr. Carpenter is identified as Secretary and Treasurer.

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The Court takes notice of the definition of “treasurer” as “An officer of a public or private corporation, company, or government, charged with the receipt, custody, investment, and disbursement of its moneys or funds.” Black’s Law Dictionary 1501 (6th ed. 1990). Thus, Plaintiff’s showing that Defendant was treasurer of Wiseguys is sufficient to shift the burden onto Defendant to establish the existence of a genuine issue of material fact, to show either that he was not in fact treasurer or that, despite his position as treasurer, he was not required to collect, account for, and pay over the tax. He has not done so. A party opposing a motion for summary judgment may not simply rely on his pleadings (especially where, as here, the Answer was not verified); he must present affidavits and documentary evidence of his own. *Doe v. Roe*, 191 Ariz. 313, 324 ¶ 33 (1998).

Therefore, IT IS ORDERED Plaintiff’s Motion for Summary Judgment is granted as to Defendants Wiseguys Inc. and Peter Carpenter.